The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendment to §111.203 and new §111.217.

The amendment to §111.203 is adopted *without change* to the proposed text as published in the February 3, 2017, issue of the *Texas Register* (42 TexReg 404) and will not be republished. New §111.217 is adopted *with change* to the proposed text and will be republished.

The commission will submit amended §111.203 and new §111.217 to the United States Environmental Protection Agency (EPA) as a revision to the State Implementation Plan (SIP).

Background and Summary of the Factual Basis for the Adopted Rules

In response to a petition for rulemaking (Project No. 2016-024-PET-NR), the commission adopts this rulemaking to amend outdoor burning rules as they relate to prescribed burning conducted by Certified and Insured Prescribed Burn Managers (CPBMs).

On February 24, 2016, Jackson Walker LLP submitted a petition for rulemaking on behalf of the Texas Forestry Association (TFA). In their petition, TFA requested that the commission amend Chapter 111, to provide specific rules for prescribed burning conducted by CPBMs who are certified by the Prescribed Burning Board (PBB) of the Texas Department of Agriculture (TDA). At the commission's agenda on April 6, 2016, the commission approved the initiation of a rulemaking based on TFA's petition.

CPBMs are regulated by the PBB under TDA's rules in 4 TAC Part 13. The standards established by the PBB represent the minimum requirements for prescribed burning in Texas for CPBMs.

The commission adopts this rulemaking to amend §111.203 and add new §111.217 to the outdoor burning rules.

Section by Section Discussion

§111.203, Definitions

The commission adopts §111.203(1) to include a definition for "Certified and Insured Prescribed Burn Manager." This definition aligns with the TDA rule definition of CPBMs.

The commission renumbers the definitions in §111.203 to accommodate the adopted definition.

The commission adopts the amendment to the definition of "Landclearing operation" in renumbered §111.203(3) to specify that prescribed burning is not considered a landclearing operation. The commission has additional regulatory requirements for landclearing operations that do not apply to prescribed burning.

The commission adopts the amendment to the definition of "Prescribed burn" in renumbered §111.203(6) to include the use of naturalized vegetative fuels in order to

align the definition with that of the Texas Natural Resources Code, which allows for the use of naturalized vegetative fuels for prescribed burning.

§111.217, Requirements for Certified and Insured Prescribed Burn Managers

The commission adopts new §111.217 to add requirements for prescribed burning when conducted under the direction of a CPBM. The commission adopts new §111.217(1) to align the requirements of commission's rules with TDA's rules in 4 TAC Chapter 227 (Requirements for Certified and Insured Prescribed Burn Managers) and Chapter 228 (Procedures for Certified and Insured Prescribed Burn Managers) as set forth by the PBB. The commission adopts new §111.217(2) - (6) to provide requirements specifically for CPBMs. Changes made from proposal to adoption include clarifying the applicability of §111.219 (General Requirements for Allowable Outdoor Burning) to CPBMs; revising wind speed to 5 - 23 miles per hour (mph), predicted; removing the flag person requirement; and revising the start time of burns to no earlier than sunrise. These requirements differ from §111.219; in that these requirements are focused on air quality impacts, and consider the extensive training and planning conducted by CPBMs.

Final Regulatory Impact Analysis Determination

The commission reviewed the adopted rules in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, Regulatory Analysis of Major Environmental Rules, and determined that the adopted rulemaking does not require a regulatory impact analysis. Specifically, the adopted rulemaking does not meet the definition of a major environmental rule as defined in the statute such that a regulatory

impact analysis would be required. Texas Government Code, §2001.0225 states that a major environmental rule is a rule for which the specific intent is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The adopted rules implement requirements of the Federal Clean Air Act (FCAA). Under 42 United States Code (USC), §7410, State implementation plans for national primary and secondary ambient air quality standards, each state is required to adopt and implement a SIP containing adequate provisions to implement, attain, maintain, and enforce the National Ambient Air Quality Standards (NAAQS) within the state. While 42 USC, §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, SIPs must include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter (meaning 42 USC, Chapter 85, Air Pollution Prevention and Control, otherwise known as the FCAA). The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their

own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs and control measures to assure that their SIPs provide for implementation, attainment, maintenance, and enforcement of the NAAQS within the state. The specific intent of the adopted rulemaking is to implement changes within Chapter 111, Subchapter B, Outdoor Burning rules for prescribed burning conducted by CPBMs who are certified by the PBB of the TDA. The adopted rulemaking amends §111.203 and adds new §111.217 to the outdoor burning rules in order to improve clarity and consistency within the outdoor burning rules in this subchapter as well as consistency with applicable laws found outside this subchapter.

However, while the adopted rulemaking protects the environment or reduces risks to human health from environmental exposure, it does not constitute a major environmental rule under Texas Government Code, §2001.0225(g)(3) because it does not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs, nor would the rulemaking adversely affect in a material way the environment or the public health and safety of the state or a sector of the state. The rulemaking as a result is not subject to a regulatory impact analysis under Texas Government Code, §2001.0225 because it is not a major environmental rule.

The requirement to provide a fiscal analysis of regulations in the Texas Government

Code was amended by Senate Bill 633 (SB 633 or bill), 75th Texas Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or those that are adopted solely under the general powers of the TCEQ. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded: based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application. The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full analysis, unless the rule was a major environmental rule that exceeded a federal law.

The FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to help ensure that those areas will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues and to meet the requirements of 42 USC, §7410, the commission routinely proposes and adopts revisions to the SIP and rules. The legislature is presumed to understand this federal scheme. If each rule adopted for inclusion in the SIP were considered a major environmental rule that exceeds federal law, then every revision to the SIP would require the full regulatory impact analysis

contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the rules have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially unamended. It is presumed that, when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation. *Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, no writ) *superseded by statute on another point of law*, Tax Code §112.108, Other Actions Prohibited, *as recognized in*, *First State Bank of Dumas v. Sharp*, 863 S.W.2d 81, 83 (Tex. App. Austin 1993, no writ); *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893

(Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied*); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978).

The commission's interpretation of the regulatory impact analysis requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of substantial compliance as required in Texas Government Code, §2001.035, Substantial Compliance Requirement; Time Limit on Procedural Challenge. The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard. The commission has complied with the requirements of Texas Government Code, §2001.0225.

Furthermore, even if the adopted rulemaking did constitute a major environmental rule, a regulatory impact analysis would not be required because the adopted rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule. Texas Government Code, §2001.0225 applies only to a major environmental rule that: 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) exceeds a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopts a rule

solely under the general powers of the agency instead of under a specific state law. The adopted rulemaking does not meet any of the four applicability criteria listed in Texas Government Code, §2001.0225 because: 1) the adopted rulemaking is part of the SIP and, as such, is designed to meet, not exceed, the relevant standard set by federal law; 2) parts of the adopted rulemaking are directly required by state law and meet but do not exceed state law; 3) no contract or delegation agreement covers the topic that is the subject of this adopted rulemaking; and 4) the adopted rulemaking is authorized by specific sections of Texas Health and Safety Code (THSC), Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code, which are cited in the Statutory Authority section of this preamble.

Specifically, even if the adopted rulemaking constitutes a major environmental rule under Texas Government Code, §2001.0225(g)(3), a regulatory impact analysis is not required because this rulemaking is part of the commission's SIP for making progress toward the attainment and maintenance of the NAAQS. Accordingly, the adopted rulemaking does not exceed a standard set by federal law or exceed an express requirement of state law, because they are part of an overall regulatory scheme designed to meet, not exceed, the relevant standard set by federal law (NAAQS). The commission is charged with protecting air quality within the state and with designing and submitting a plan to achieve attainment and maintenance of the federally mandated NAAQS. The Third District Court of Appeals upheld this interpretation in *Brazoria County v. Texas Comm'n on Envtl. Quality*, 128 S.W. 3d 728 (Tex. App. - Austin 2004, no writ). The specific intent of the adopted rulemaking is merely an update to

Chapter 111, Subchapter B, §111.203, to add clarity to certain definitions and create consistency with applicable definitions found outside this subchapter, and the addition of new §111.217, which merely cross-references the applicable requirements for outdoor burning found in 4 TAC Chapters 227 and 228, relating to prescribed burns conducted by CPBMs, as well as the general requirements for outdoor burning in §111.219. This adoption, therefore, does not exceed an express requirement of federal law. The revisions are needed to implement state law, which the new requirements also do not exceed. Finally, this rulemaking was not developed solely under the general powers of the agency but is authorized by specific sections of the THSC, Chapter 382, which are cited in the Statutory Authority section of this preamble, including THSC, §382.012, State Air Control Plan and §382.017, Rules. Because this adopted rulemaking does not meet any of the four applicability requirements, Texas Government Code, §2001.0225(b) does not apply, and a regulatory impact analysis is not required.

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No comments were received regarding the Draft Regulatory Impact Analysis Determination.

Takings Impact Assessment

The commission evaluated the adopted rulemaking and performed an assessment as to whether Texas Government Code, Chapter 2007, Governmental Action Affecting Private Property Rights, is applicable and found that it does not apply. The requirements relating to outdoor burning, and specifically prescribed burns, are control measures for

particulate matter emissions and are essential for attainment and maintenance of the particulate matter NAAQS. Specifically, the adopted rulemaking provides a definition for "Certified and Insured Prescribed Burn Manager" that aligns with the definition provided by TDA; clarifies that prescribed burning is not considered a landclearing operation, which has additional regulatory requirements that do not apply to prescribed burning; expands the definition of "Prescribed burn" to include naturalized vegetative fuels, which aligns with the definition under the Texas Natural Resources Code; renumbers the definitions for organizational purposes; and adds new §111.217, providing requirements for prescribed burns conducted under CPBMs, which aligns with TDA's rules for such, as set forth by the PBB, and requires CPBMs to follow the same general requirements of §111.219, which are not required by the PBB. Texas Government Code, §2007.003(b)(4), provides that Texas Government Code, Chapter 2007 does not apply to this adopted rulemaking because it is an action reasonably taken to fulfill an obligation mandated by federal law.

In addition, the commission's assessment indicates that Texas Government Code, Chapter 2007, Government Action Affecting Private Property Rights does not apply to these adopted rules because this is an action that is taken in response to a real and substantial threat to public health and safety; that is designed to significantly advance the health and safety purpose; and that does not impose a greater burden than is necessary to achieve the health and safety purpose. Thus, this action is exempt under Texas Government Code, §2007.003(b)(13). The specific intent of the adopted rulemaking is to clarify the rule requirements for prescribed burning and align the

requirements in this subchapter with those found outside this subchapter to allow for more streamlined, consistent, and clear rules to be applied to prescribed burning, which leads to the increased protection of health and safety. The adopted rulemaking adds a definition for "Certified and Insured Prescribed Burn Manager" that aligns with TDA definitions and clarifies that prescribed burning is not considered a landclearing operation, which has additional regulatory requirements that do not apply to prescribed burning. The adopted rulemaking expands the definition of "Prescribed burn" to include naturalized vegetative fuels, which aligns with the definition under the Texas Natural Resources Code, and renumbers the definitions for organizational purposes. The adopted rulemaking also adds a section that provides specific requirements for prescribed burns conducted under CPBMs, which aligns with TDA's rules for such, as set forth by the PBB, and requires CPBMs to follow the same general requirements of §111.219, which are not required by the PBB.

Consequently, the adopted rulemaking meets the exemption criteria in Texas Government Code, §2007.003(b)(4) and (13). For these reasons, Texas Government Code, Chapter 2007 does not apply to this adopted rulemaking.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found the adoption is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) relating to actions and rules subject to the Coastal Management Program, and will, therefore, require that the goals and policies of the Texas Coastal Management

Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with the CMP goals and policies.

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding the consistency with the CMP.

Effect on Sites Subject to the Federal Operating Permits Program

Because Chapter 111 contains applicable requirements under 30 TAC Chapter 122, owners or operators subject to the Federal Operating Permits Program must, consistent with the revision process in Chapter 122, revise their operating permit to include the revised Chapter 111 requirements for each emission unit affected by the revisions to Chapter 111 at their site, upon the effective date of the adopted rulemaking.

Public Comment

The commission held a public hearing on February 28, 2017. The comment period closed on March 6, 2017. The commission received comments from Acorn Forestry, TDA, and TFA.

Response to Comments

Comment

TDA recommended that the commission not adopt the rules set out in TCEQ's Rule Project Number 2016-027-111-CE. TDA recommended that TCEQ instead at this time consult with PBB regarding any additional standards necessary for CPBMs while conducting prescribed burns. TDA stated that, after discussions, PBB can follow up with appropriate rules, if necessary. Further, TDA suggested that TCEQ and TDA address enforcement through a memorandum of understanding (MOU).

Response

The commission disagrees with TDA's recommendation that the agency not adopt the proposed rulemaking. The purpose of the rulemaking is to provide additional flexibility for CPBMs when conducting prescribed burning. Failing to adopt the proposed rulemaking would require that CPBMs continue to comply with the general requirements for allowable outdoor burning in §111.219, which is laid out in §111.211, Exceptions for Prescribed Burn. The commission is willing to work with TDA on cross-jurisdictional issues; however, the outdoor burning rules in Chapter 111 are included in the SIP. Any modifications to the SIP must be submitted to the EPA for review and approval, including this rulemaking for Chapter 111.

Furthermore, replacing the current EPA-approved Chapter 111 outdoor burning rules with PBB's rules and an MOU between TDA and TCEQ would needlessly place a

significant burden on the PBB and TDA as well as complicate potential future SIP revisions. If the EPA were to approve the revision, future modifications to the PBB's rules or the MOU would necessarily be SIP revisions, subject to the public notice and comment process required for all SIP revisions as well as EPA review and approval. As the TCEQ is much more familiar with the SIP revision process, the commission prefers to continue to rely on the outdoor burning rules in Chapter 111 for SIP purposes. The commission is adopting the rulemaking with changes made in response to comments as discussed elsewhere in the Response to Comments portion of this preamble.

There were no changes made in response to this comment.

Comment

TFA recommended including additional language for clarification that CPBMs must comply with the requirements in §111.217 and are not required to comply with the general requirements for allowable outdoor burning in §111.219.

Response

The commission agrees that the intent of the proposed rulemaking is that CPBMs are required to comply with the requirements of §111.217 in lieu of complying with the requirements of §111.219. Section 111.219 states that outdoor burning is subject to that section when specified, and §111.217 does not specify that §111.219 applies to CPBMs. In response to this comment, the commission amends the introductory

paragraph of §111.217 to clarify that CPBMs must comply with the requirements of §111.217 in lieu of the requirements in §111.219.

Comment

Acorn Forestry and TFA recommended that the commission delete proposed §111.217(6) because the restrictions in §111.217(4) make §111.217(6) redundant. Commenters suggested that, even if the commission did not delete proposed §111.217(6), the commission should amend the paragraph.

Specifically, Acorn Forestry commented that surface wind speed measurements were not necessary and that it was the combination of both the wind speeds on the surface and mixing heights that gets particulate matter out and away from the area of the burn and dispersed. Acorn Forestry also stated that first thing in the morning, winds tend to be slower, temperatures tend to be down, and relative humidity tends to be elevated, all of which makes it by far the safest time to work and that, accordingly, the time-of-day requirement should be changed. Specifically, commenters requested that burning be allowed to commence at sunrise.

TFA additionally commented that, by requiring the predicted wind speed to be at least 6 mph, the rule, in effect, requires predicted wind speeds to be at least 10 mph. TFA explained that wind speed predictions are posted in 5 mph increments. As a result, in combination with TCEQ's existing requirement of 6 mph predicted wind speed to burn, CPBMs are hindered from burning at actual wind speeds (i.e. at 6 - 9 mph) that would

otherwise comport with TCEQ's rules. To further support the recommended wind speed requirement change, TFA also referenced Texas Parks and Wildlife Department's recommendations that state range burning is safe with wind speeds of 5 to 15 mph and United States Department of Agriculture Forest Service recommendations using high-level wind speeds rather than ground-level for accurate prediction of smoke dispersion. TFA asked the commission to amend its rules such that allowable wind speeds are below a predicted wind speed of 6 mph, allowing CPBMs to gain a safer work area.

Response

The commission disagrees that the provisions of proposed §111.217(6) are redundant. Section 111.217(4) is a general requirement that CPBMs prohibit burning that would cause adverse effects, whereas proposed §111.217(6) includes specific requirements for burning. Additionally, §111.217(4) can only be practically enforced in situations where impacts of smoke from a burn can be readily detected, i.e., the smoke can be seen or smelled. The intent of the provisions under proposed §111.217(6) is to help prevent broader, less readily detectible impacts that may go beyond the ability of CPBM's to detect or predict, particularly the provisions in proposed §111.217(6)(B) and (C). For example, burning on stagnant air days or with a persistent temperature inversion could lead to air quality issues further from the burn site beyond just what can be seen or smelled (e.g., smoke), such as contributing to elevated concentrations of particulate matter or ozone formation.

However, the commission agrees that some of the other suggested amendments to the proposed rule language are appropriate. The commission revises §111.217(6)(A), renumbered at adoption as §111.217(5)(A), to allow burning to begin at sunrise in lieu of one hour after sunrise as proposed. The commission established the time-of-day provisions to help ensure appropriate meteorological conditions for proper dispersion, originally requiring burning to start after 9:00 a.m. and then adjusted to the current hour after sunrise to provide additional flexibility while still avoiding concerns about the occasional morning inversion period (September 3, 1996, 21 TexReg 8506). However, while temporary temperature inversions may still occur in some situations during the first hour after sunrise, potential impacts from starting a burn during this time would be minimized by adhering to the wind speed requirements discussed previously. Moreover, the emissions during this initial, additional, hour will be much less than when the prescribed burn has peaked, which would be expected to occur later in the day after any temporary inversion dissipates. Furthermore, any potential adverse impacts that might occur should be mitigated by and enforced against through §111.217(4) due to the short time interval difference. The time of day that emissions occur can be a factor in broader air quality impacts, such as ozone formation, but such factors are over much wider time intervals, e.g., delaying emission until the afternoon versus morning. Changing the allowed time in adopted §111.217(5)(A) to allow burning to start at sunrise when other meteorological factors, including wind speeds, are adequate to promote smoke dispersion should not have any adverse air quality impacts and provides additional safety due to generally more favorable conditions with an earlier start. Additionally,

the commission notes that the determination regarding the time of day to begin burning is specific to prescribed burning only, due to the enforceable provisions of this rulemaking, and that it is not applicable to air curtain incinerators.

Proposed §111.217(6)(B) does not specify a source for wind speed data. Some online data sources provide predicted wind speed data in single mile per hour increments (e.g., *www.nws.noaa.gov*). Nevertheless, the commission agrees that a modification to the lower end of the wind speed range in §111.217(6)(B) in order to conform to certain readily available sources of predicted wind speed data would provide CPBMs with additional flexibility. Therefore, the commission revises §111.217(6)(B), renumbered at adoption as §111.217(5)(B), to state that burning shall not be commenced when surface wind speeds are predicted to be less than 5 mph or greater than 23 mph. The commission does not expect the change to the lower limit of the wind speed range from 6 mph to 5 mph to impact air quality. The commission recognizes that many factors affect production and dispersion of smoke, including wind speed (at transport and surface heights) and atmospheric stability (e.g., vertical mixing and mixing height). From a smoke management perspective, higher wind speeds are more favorable for dispersion. However, the effect of other factors, such as atmospheric stability, limit generalizations that can be made regarding the role of wind speed alone, particularly in single mph increments. Rather than burdening CPBMs by requiring advanced screening techniques for each fire that they take into account additional factors beyond those listed in adopted §111.217(5), the commission finds that changing the lower limit of the wind speed range from 6 mph

to 5 mph provides flexibility while also limiting the potential for air quality impacts associated with smoke from prescribed fires.

Comment

Acorn Forestry and TFA commented that TCEQ should not require flag-persons to be posted on roads under certain circumstances during prescribed burns because there are existing rules under the jurisdiction of the Texas Department of Transportation (TXDOT) that regulate the training and operations of flaggers. Acorn Forestry further commented that other types of road-workers (e.g., landscapers, mowers, utility workers, etc.) must display signs while working, but flaggers are not required. Acorn Forestry and TFA further commented that TCEQ's rules do not define a "road or highway," noting that prescribed burns are most common in rural locations with dirt or gravel roads where traffic can be non-existent or infrequent. TFA commented that cars should not be driving more than 30 mph in these areas. Accordingly, Acorn Forestry and TFA recommended changing the flag person requirement to a requirement for CPBMs to instead place signs on roads. Additionally, TFA recommended that signs only be required for roads with a speed limit over 30 mph. Acorn Forestry commented that a requirement of a burn plan, which TDA's rules require, is to minimize and mitigate impacts to roads. The commenters requested that §111.217(5) be removed or altered to require signs on roads over a certain speed limit without flag-persons.

Response

The commission acknowledges that TXDOT also has rules pertaining to flag-persons. Multiple state agencies can have rules or regulations with overlapping authority. The intent of the provision under proposed §111.217(5) is to help prevent broader, less readily detectible impacts that may go beyond the ability of CPBMs to detect or predict. TCEQ does not require training and simply requires that a flag person must be present.

However, the commission agrees that revising the proposed rule language is appropriate. The commission is not including proposed §111.217(5) in the adopted rule, given that preventing adverse effects from affecting public roads is included in §111.217(4) and 30 TAC §101.5. This does not exempt CPBMs from complying with other state and federal regulations.

Comment

TFA recommended that the commission revise the definition of "Structure containing sensitive receptors" to ensure that hunting camps and other temporary lodging structures, used on large rural tracts for limited periods, are not included. Acorn Forestry commented that the current definition creates a burden on CPBMs when they must obtain permission from landowners or leaseholders that do not permanently reside on affected properties.

Response

The petition for rulemaking requested this change but it was not included in the proposal. The commission did not change the definition language based on stakeholder comments that "hunting camp" is an overly narrow and not easily defined term, and because the commission wishes to maintain consistency with other state regulations. TDA's rules also define sensitive receptors and do not exclude hunting camps or other temporary lodging structures used on large rural tracts for limited periods. Since the proposed rule language did not include changes to the definition of sensitive receptors, the public and other interested parties would not have an opportunity to comment. Therefore, the suggested change is outside the scope of this rulemaking. In addition, TCEQ's adopted rules for CPBMs do not require permission from sensitive receptors.

There were no changes made in response to this comment.

Comment

TDA commented that the proposed rules overlap with PBB's rules and creates ambiguity regarding regulatory authority over the Texas Prescribed Burning Program. Additionally, the proposed rules raise the possibility that a CPBM could face enforcement action by both TCEQ and TDA for a violation of a PBB rule.

Response

The commission agrees that violations could be subject to enforcement actions by TCEQ and TDA. Multiple state agencies can have rules or regulations with

overlapping authority. It is the responsibility of regulated entities to determine what rules and regulations apply to them prior to commencing regulated activities.

There were no changes made in response to this comment.

Comment

Acorn Forestry requested an exemption from obtaining an authorization from sensitive receptors.

Response

The commission acknowledges the commenter's request. However, §111.217 does not include a requirement to obtain authorization from sensitive receptors. The new section requires notification to the appropriate commission regional office prior to the proposed burn, when possible. Notification to the Texas Forest Service is also required prior to prescribed or controlled burning for forest management purposes. The commission notes that CPBMs are required to obtain permission from sensitive receptors by applicable laws found outside this subchapter and when complying with TDA's rules at 4 TAC §228.2(a)(1).

There were no changes made in response to this comment.

SUBCHAPTER B: OUTDOOR BURNING

§111.203, §111.217

Statutory Authority

The amendment and new section are adopted under the authority of Texas Water Code (TWC) §5.102, General Powers, §5.103, Rules, and §5.105, General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties as well as all general policies under the TWC; Texas Health and Safety Code (THSC), §382.017, Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.002, Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; THSC, §382.018, Outdoor Burning of Waste and Combustible Material, which authorizes the commission to control and prohibit the outdoor burning of waste and combustible material; and THSC, §382.085, Unauthorized Emissions Prohibited. The amendment and new section are also adopted under THSC, §382.051, Permitting Authority of Commission; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits under THSC, Chapter 382, Clean Air Act, and under the Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401 *et seq*,

Congressional findings and declaration of purpose, which requires states to submit state implementation plan revisions that specify the manner in which the National Ambient Air Quality Standards will be achieved and maintained within each air quality control region of the state.

The adopted amendment and new section implement TWC, §§5.102, 5.103, and 5.105; THSC, §§382.002, 382.011, 382.012, 382.017, 382.018, 382.051, and 382.085; and FCAA, 42 USC, §§7401 *et seq.*

§111.203. Definitions.

Unless specifically defined in the Texas Clean Air Act (TCAA) or in the rules of the Texas Commission on Environmental Quality (commission), the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms that are defined by the TCAA, the following terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise.

(1) Certified and Insured Prescribed Burn Manager--A person with ultimate authority and responsibility for a prescribed burn, who has been certified by the Prescribed Burning Board of the Texas Department of Agriculture. The certification issued by the Prescribed Burning Board must be considered effective, and to have met

the certification requirements found in 4 TAC Chapter 226 (relating to Requirements for Certification by the Board), at the time the prescribed burn is conducted.

(2) Extinguished--The absence of any visible flames, glowing coals, or smoke.

(3) Landclearing operation--The uprooting, cutting, or clearing of vegetation in connection with conversion for the construction of buildings, rights-of-way, residential, commercial, or industrial development, or the clearing of vegetation to enhance property value, access, or production. It does not include the maintenance burning of on-site property wastes such as fallen limbs, branches, or leaves, or other wastes from routine property clean-up activities, nor does it include prescribed burning or burning following clearing for ecological restoration.

(4) Neighborhood--A platted subdivision or property contiguous to and within 300 feet of a platted subdivision.

(5) Practical alternative--An economically, technologically, ecologically, and logistically viable option.

(6) Prescribed burn--The controlled application of fire to naturally occurring or naturalized vegetative fuels under specified environmental conditions and

confined to a predetermined area, following appropriate planning and precautionary measures.

(7) Refuse--Garbage, rubbish, paper, and other decayable and nondecayable waste, including vegetable matter and animal and fish carcasses.

(8) Structure containing sensitive receptor(s)--A man-made structure utilized for human residence or business, the containment of livestock, or the housing of sensitive live vegetation. The term "man-made structure" does not include such things as range fences, roads, bridges, hunting blinds, or facilities used solely for the storage of hay or other livestock feeds. The term "sensitive live vegetation" is defined as vegetation that has potential to be damaged by smoke and heat, examples of which include, but are not limited to, nursery production, mushroom cultivation, pharmaceutical plant production, or laboratory experiments involving plants.

(9) Sunrise/Sunset--Official sunrise/sunset as set forth in the United States Naval Observatory tables available from National Weather Service offices.

(10) Wildland--Uncultivated land other than fallow, land minimally influenced by human activity, and land maintained for biodiversity, wildlife forage production, protective plant cover, or wildlife habitat.

§111.217. Requirements for Certified and Insured Prescribed Burn Managers.

Prescribed burning shall be authorized when conducted under the direction of a Certified and Insured Prescribed Burn Manager, as defined in §111.203 of this title (relating to Definitions), for forest, range and wildland/wildlife management and wildfire hazard mitigation purposes, with the exception of coastal salt-marsh management burning. When possible, notification of intent to burn should be made to the appropriate commission regional office prior to the proposed burn. Commission notification or approval is not required. Such burning shall be subject to the following requirements, and not the requirements in §111.219 of this title (relating to General Requirements for Allowable Outdoor Burning).

(1) 4 TAC Chapter 227 (relating to Requirements for Certified and Insured Prescribed Burn Managers) and Chapter 228 (relating to Procedures for Certified and Insured Prescribed Burn Managers).

(2) Prior to prescribed or controlled burning for forest management purposes, the Texas Forest Service shall be notified.

(3) Burning must be outside the corporate limits of a city or town except where the incorporated city or town has enacted ordinances which permit burning consistent with the Texas Clean Air Act, Subchapter E, Authority of Local Governments.

(4) Burning shall be commenced and conducted only when wind direction and other meteorological conditions are such that smoke and other pollutants will not cause adverse effects to any public road, landing strip, navigable water, or off-site structure containing sensitive receptor(s).

(5) Burning shall be conducted in compliance with the following meteorological and timing considerations:

(A) The initiation of burning shall commence no earlier than sunrise. Burning shall be completed on the same day not later than one hour before sunset, and shall be attended by a responsible party at all times during the active burn phase when the fire is progressing. In cases where residual fires and/or smoldering objects continue to emit smoke after this time, such areas shall be extinguished if the smoke from these areas has the potential to create a nuisance or traffic hazard condition. In no case shall the extent of the burn area be allowed to increase after this time.

(B) Burning shall not be commenced when surface wind speed is predicted to be less than five miles per hour (mph) (four knots) or greater than 23 mph (20 knots) during the burn period.

(C) Burning shall not be conducted during periods of actual or predicted persistent low-level atmospheric temperature inversions.

(6) Electrical insulation, treated lumber, plastics, non-wood construction/demolition materials, heavy oils, asphaltic materials, potentially explosive materials, chemical wastes, and items containing natural or synthetic rubber must not be burned.